

41. The licenses for stations KNBT299, WNYR424, and WNPY680 were obtained through assignment. Tr. 101.⁵ Kay made the arrangements for Sobel to acquire those licenses. Id. Sobel paid nothing for those licenses, and he does not know whether money was paid for those licenses (or any of the other details on the assignments). Tr. 102.

42. Under Paragraph VII of the management agreement, Kay has the exclusive option to purchase any of the Management Agreement stations at any time for \$500 each. WTB Ex. 39, P. 4. The sale includes not only the license and the station assets but also any business created by operation of the station. WTB Ex. 39, P. 5. Paragraph VII E. requires Sobel to "maintain exclusive ownership and control of the license for the Stations" until and unless the licenses are assigned to Kay. Id. Therefore, Sobel cannot sell any of the Management Agreement stations without Kay's permission. Tr. 125-126. In contrast, if Kay wished to sell any of the Management Agreement stations, he could exercise his option to purchase the station and then direct Sobel to assign the station to Kay's designee, even if Sobel objected.

43. There are three stations subject to the Management Agreement that have been sold. Tr. 126. One station was sold to William Matson for between \$70,000 and \$100,000. Tr. 126, 366. Kay arranged for the sale of that station. Tr. 366. Sobel received \$20,500 from that sale, and Kay received the balance of the money. Tr. 126-127, 366-367. Part of Kay's consideration for receiving the majority of the sales proceeds was expenses he incurred

⁵ It is possible that Sobel independently attained authorizations on co-channel frequencies for the same stations. Tr. 101.

in clearing the channel. Tr. 127, 373. Sobel asked Kay for \$20,000, and Kay agreed. Tr. 374. With respect to the second station that was sold, Sobel only received \$500; Sobel does not know how much money the second station was sold for. Tr. 127-128. The third station was sold as part of a trade, so no money was exchanged. Tr. 127. The exchange appears to be part of Kay's work in clearing the Management Agreement channels because Sobel received a cancellation of a license on another frequency, which increased the value of one of his licenses. Tr. 128.

44. According to Sobel, Mr. Matson approached Kay and offered \$1.5 million for the Management Agreement stations. Tr. 275. Sobel testified that he thought the stations had potential to make money and that he wanted to keep the stations. Id. He claims that Kay was interested in selling the stations, but that "I convinced him otherwise." Id. Sobel believes the stations are capable of making \$1,000 a month per station. Tr. 268. Sobel claims it was his intention to operate the stations as opposed to selling them. Tr. 267-268. If the fifteen stations each made \$1,000 a month, Sobel would receive \$3,000 a month under the management agreement.⁶

c. Setting of Prices

45. Paragraph I of the management agreement gives Kay the sole right to negotiate contracts with customers. WTB Ex. 39, P. 2, Tr. 128. Sobel's rights to influence the prices

⁶ The first \$9,000 a month, or \$600 a month times fifteen stations, would go to Kay. The remaining \$6,000 would be split equally between Kay and Sobel.

charged to customers on the Management Agreement stations are contained in Paragraph VIII of the Management Agreement. WTB Ex. 39, P. 5. That paragraph gives Sobel the right to reject any end user contracts within five days after Kay presents the end user contract to him if the rejection is "reasonable and based on the mutual interests of the parties." Id. Sobel reviews contracts with customers on the Management Agreement stations maybe once or twice a month. Tr. 122. Out of the several hundred customers on the Management Agreement stations, there have been two or three occasions on which Sobel changed a rate negotiated by Kay or his employees. Tr. 123. On one occasion, involving Sun West Materials, Sobel and Kay had discussed charging one rate, but Sobel decided to charge a higher rate. Id.

46. The standard rate charged to customers of both the Management Agreement stations and Kay's stations is twelve dollars a month for each mobile transmitter. Tr. 129. Kay charges the same rate for use of the 800 MHz stations licensed in his name. Id. Since Kay's salespeople do not know whether they are selling time on a station owned by Kay or a station managed by Kay (Tr. 344), it follows that the rates for both types of stations would always be the same unless there were special negotiations. The last change in the standard rate was approximately three or four years ago. Tr. 129-130. Sobel does not recall whose idea it was to make that change. Tr. 130. At times, discounts are negotiated with the larger customers. Tr. 129. According to Sobel, Kay or his employees do the majority of the negotiating with customers, but he also does some negotiating with customers. Id. Sobel only discusses rates with Kay or his employees a handful of times a year, if that. Id. Sobel also handles special problems involving Kay's customers. Tr. 72.

d. Retention of Counsel

47. Brown & Schwaninger became Sobel's FCC attorneys in the early-to-mid 1990s. Tr. 109. Kay introduced Sobel to that firm, which also represented Kay. Tr. 109, 370-371. Brown & Schwaninger represented both parties when they were preparing the management agreement. Tr. 109-110. Robert Keller, who also represents Kay in certain FCC matters, is currently Sobel's FCC counsel. Tr. 110. Sobel asked Kay whom he could use instead of Brown & Schwaninger, and Kay directed him to Mr. Keller. Id. Kay has paid all of Sobel's legal fees with respect to the Management Agreement stations, including the legal fees in connection with this hearing. Tr. 109, 112.

6. Control Over Personnel

48. Sobel has no employees. Tr. 130. Sobel is not sure if he has ever hired a contractor to do work relating to the Management Agreement stations. Id. The employees of Kay who perform work relating to the Management Agreement stations are hired, fired, and supervised by Kay. Id.

49. As noted above, Kay's salespeople sell time on the Management Agreement stations as well as other stations Kay owns or manages. Tr. 344-345. The employees of Kay described below perform their duties with respect to the Management Agreement stations as well as other stations Kay owns or manages. Tr. 340, 342-343. Ms. Ashaur performs the billing, the receivables, and runs the accounting department, and sometimes serves as Kay's secretary. Tr. 339. Ophelia Nunez works on accounts receivable, posts monies, prepares

bills, prepares bank deposits, works on legal matters, and prepares summons and complaints. Tr. 340-341. Damon Crowley, Sr. performs secretarial work, sorts files, performs accounts receivable and collections work, and works on legals. Tr. 341. Ken Schultz, who until recently was the acting general manager or service manager for Southland, is now a lead technician who repairs radios. Id. Randy French is a technician. Tr. 342. The technicians also check and test repeaters that may have failed. Tr. 343.

50. Sobel claims that most of the hours that have been spent operating and managing the Management Agreement stations have been invested by him. Tr. 266-267. As noted in Para. 10 above, Sobel has devoted an average of about ten hours a week to repairing and maintaining all of the 350 stations Kay owns or manages. Moreover, as noted above in Paragraph 39, supra, Kay spent the time and effort to clear the Management Agreement channels because Sobel did not have the time to do so.

7. Payment of Operating Expenses

51. Under Paragraph IV of the Management Agreement, Kay is responsible for paying all expenses relating to the construction of the Management Agreement stations. WTB Ex. 39, P. 3. Similarly, under paragraph XIII of the agreement, Kay is responsible for paying all expenses associated with the operation of the stations. WTB Ex. 39, P. 6, Tr. 131. Other than a possible instance where Sobel obtained a part for a Management Agreement station and then missed billing Kay for that part, Kay has in fact paid all the operating expenses relating to the Management Agreement stations. Tr. 131.

52. Kay estimates that his total investment in equipment for the Management Agreement stations is about \$97,500. Tr. 354. Kay cannot accurately estimate how much he has paid in operating expenses for the Management Agreement stations because he does not break out his expenses based upon who holds the underlying licenses. Tr. 351-352. For example, Kay pays one check for rent on Mount Lukens, and pays one electric bill for equipment used by stations licensed to him, Sobel, or other stations he manages. Tr. 352. Kay explained that one reason he functions efficiently is that he cuts down "on a lot of extraneous and unnecessary bookkeeping to keep it simple." Tr. 355.

8. Receipt of Monies and Profits

53. The revenues from the operation of the Management Agreement stations are deposited into Kay's bank account, which is the same bank account that the revenues from the operation of Kay's owned stations are deposited. Tr. 348. Pursuant to the management agreement, if any station's monthly revenue exceeds \$600 a month, Sobel is entitled to fifty percent of the excess revenue. WTB Ex. 39, P. 4. The revenue from four of the fifteen Management Agreement stations has each exceeded \$600 a month. Tr. 132. However, because of the manner in which Kay and Sobel have opted to implement the agreement, Kay has retained all the money and will continue to do so until the total revenue from all the stations exceeds \$9,000 a month (i.e., \$600 x 15 stations). Id. The last time Sobel checked the stations' monthly revenues, which was a few months ago, the total from the Management Agreement stations was between \$6,000 and \$7,000. Id. Except for the hourly fees Sobel has received from working for Kay on the Management Agreement stations, and the money

he received in connection with the sale of two stations, Sobel has not received any money from the Management Agreement stations. Tr. 131-132.

B. Misrepresentation/Lack of Candor Issue

1. Responses to Application Return Notices

54. In the responses to the application return notices relating to the Management Agreement stations (WTB Exs. 19, 21, and 23), Kay provided invoices from certain customers of the Management Agreement stations. WTB Ex. 19, Pp. 4-7, WTB Ex. 21, Pp. 5-7, WTB Ex. 23, Pp. 4-7. Certain information is masked out on the invoices, and it was masked out when it was sent to the Commission. Id., Tr. 88. While Kay does not recall masking out the information, he testified he probably did so. Tr. 337-339. The information that was masked out on the invoices was the name and address of Lucky's Two-Way Radio, a name under which Kay does business (Tr. 333). Tr. 90-91, 94. The information concealed from the Commission was the fact that Lucky's performed the billing for the Management Agreement stations. While Sobel does not specifically recall seeing these letters with the masked out invoices attached, he believes he did because the letters came from his files. Tr. 238-239. Sobel and Kay testified that the name and address of Lucky's was masked out because it was "unnecessary" or "irrelevant." Tr. 91, 95, 98, 337-339. None of the other information on the invoices was masked out, including the fees charged the customers. WTB Ex. 19, Pp. 4-7, WTB Ex. 21, Pp. 5-7. WTB Ex. 23, Pp. 4-7.

2. The Management Agreement

55. Sobel repeatedly testified that the purpose of the Management Agreement was to show that he and Kay were separate entities doing business together. Tr. 258, 262-263. The alleged purpose of the Management Agreement was to explain the relationship between Sobel and Kay. Tr. 301. Sobel asked for his oral agreement with Kay to be reduced to writing because "the Commission was confused about our relationship between Mr. Kay and myself." Tr. 258. Notwithstanding those facts, Sobel did not file the written agreement with the Commission when he signed it. Tr. 303. When the Presiding Judge first asked whether Sobel filed the agreement when he signed it, Sobel attempted to claim that Kay filed the agreement along with Kay's motion to enlarge. Id. Counsel for Sobel then stipulated that Sobel was incorrect. Id. The following exchange then ensued:

JUDGE FRYSIK: Getting back to what we had talked about, you indicated yesterday that you signed the agreement so that the Commission would be made aware of your relationship with Mr. Kay. That the agreement was signed in response to complaints that might have been filed against you and the Commission, about your relationship with Mr. Kay? If that was so important for you to do, why didn't you apprise the Commission of this agreement at the time that you signed it?

THE WITNESS [Sobel]: The Commission doesn't -- maybe I'm speaking for them, but I had no anticipation of the Commission -- If I threw this piece of paper at the Commission and said, do something about it, they don't necessarily -- They're not obligated to respond to me. They're not obligated to do anything with it, necessarily.

JUDGE FRYSIK: It was at that time your applications were being held back, you said.

THE WITNESS [Sobel]: There was -- I was stuck in the process through Mr. Kay's Designation Order. And there was nothing I could do to get out of this process. The management agreement --

Tr. 303-304. In fact, Sobel did not submit the Management Agreement to the Commission until July 3, 1996, after the Commission specifically asked for it in its letter of inquiry to Sobel. Tr. 313-314.

3. The Stanford Letter

56. On December 6, 1994, Sobel wrote to Gary Stanford at the Federal Communications Commission office in Gettysburg, PA. WTB Ex. 46. Sobel composed the letter personally. Tr. 158. The letter complains about Sobel's applications being held up because of an investigation of Kay. WTB Ex. 46, P. 1. Sobel represented to the Commission in his letter:

I can only assume that I have been "black listed" by Mr. Hollingsworth and am having my applications held, my customer's applications held, and my finder's preference requests ignored due to my association with Mr. Kay. Contrary to whatever beliefs that may be held by Mr. Hollingsworth, which have resulted in his taking unwarranted actions against me, I would like to assure you that I am an Independent Two Way Radio Dealer. I am not an employee of Mr. Kay's or of any of Mr. Kay's companies. I am not related to Mr. Kay in any way. I have my own office and business telephone numbers. I advertise under my own company name in the Yellow Pages. My business tax registration and resale tax permits go back to 1978 - long before I began conducting any business whatsoever with Mr. Kay - the apparent target of Mr. Hollingsworth.

WTB Ex. 46, P. 1 (emphasis in original). The letter does not state the following facts: (1) Kay manages Sobel's 800 MHz stations pursuant to a Management Agreement (WTB Ex. 39); (2) Kay was responsible for finding the frequencies and preparing the applications for the Management Agreement stations (Tr. 73-75); (3) Kay provided all the money and the

equipment needed to build the Management Agreement stations (Tr. 144); (4) when Sobel worked on the stations, he did so as a contractor selected and paid by Kay (Tr. 106-108); (5) Kay made the arrangements to acquire and dispose of these licenses (Tr. 101, 126-128); (6) Kay's employees were involved in virtually every aspect of the stations' daily operations (Tr. 339-347); (7) Kay paid all the expenses of the Management Agreement stations, including Sobel's legal fees (Tr. 109, 131); (8) the sales, billing, collections and record keeping for the Management Agreement stations was performed by Kay and his staff at Kay's office (Tr. 339-347); and (9) the revenues from the Management Agreement stations went into Kay's bank account, and Sobel had not received any of the operating revenues of the stations. Tr. 144, 348. Notwithstanding those facts, Sobel repeatedly testified at the hearing that he is independent of Kay with respect to the Management Agreement stations. Tr. 157-159.

4. The January 1995 Affidavits

a. Introduction and Purpose of Affidavits

57. WTB Ex. 41 is an affidavit signed by Sobel and dated January 11, 1995. In its entirety, the document reads as follows:

I, Marc Sobel, am an individual, entirely separate and apart in existence and identity from James A. Kay, Jr. Mr. Kay does not do business in my name and I do not do business in his name. Mr. Kay has no interest in any radio station or license of which I am the licensee. I have no interest in any radio station or license of which Mr. Kay is the licensee. I am not an employer or employee of Mr. Kay, am not a partner with Mr. Kay in any enterprise, and am not a shareholder in any corporation in which Mr. Kay also holds an interest. I am not related to Mr. Kay in any way by birth or marriage.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on Jan 11, 1995.

WTB Ex. 41. This affidavit was submitted to the Commission as part of a pleading entitled "Motion to Enlarge, Change, or Delete Issues" filed on Kay's behalf in the Kay proceeding on January 12, 1995. WTB Ex. 42 (Motion), Pp. 1, 25, Tr. 368. WTB Ex. 43 is a document identical to WTB Ex. 41, except that it is dated January 24, 1995. Compare WTB Exs. 41 and 43. WTB Ex. 43 was submitted to Administrative Law Judge Richard L. Sippel as part of a pleading entitled "Motion to Enlarge, Change, or Delete Issues" filed on Kay's behalf in the Kay proceeding on January 25, 1995. WTB Ex. 44 (Refiled Motion), Pp. 1, 22. The Refiled Motion was filed with the Presiding Judge because the Motion was misfiled with the Commission. Tr. 141, 369-370.

58. On January 9 or 10, 1995, Kay received an unsigned version of WTB Ex. 41 from Brown & Schwaninger. Tr. 370. Kay read the package, talked to Brown & Schwaninger, called Sobel, and told him "that there was an affidavit that my attorneys wanted him to read. And, if correct, execute it." Tr. 371. Kay and Sobel then had a face-to-face meeting, and Kay asked Sobel if he would sign the document. Tr. 140, 371. Although he understood he could add anything he wanted to the document, Sobel signed the document without making any changes and without adding any material. Tr. 141.

59. The portion of the Motion relating to the licenses in Sobel's name reads as follows:

James A. Kay, Jr. is an individual. Marc Sobel is a different individual. Kay does not do business in the name of Marc Sobel or use Sobel's name in any way. As shown by the affidavit of Marc Sobel attached as Exhibit II hereto, Kay has no interest in any of the licenses or stations held by Marc Sobel. Marc Sobel has no interest in any of the licenses or stations authorized to Kay or any business entity in which Kay holds an interest. Because Kay has no interest in any license or station in common with Marc Sobel and because Sobel was not named named [sic] as a party to the instant proceeding, the Commission should either change the OSC to delete the reference to the stations identified as stations 154 through 164 in Appendix A, or should dismiss the OSC with respect to those stations.

WTB Ex. 42, Pp. 7-8. The Refiled Motion makes the same factual statements and argument, although the language is changed slightly because the pleading was filed with Judge Sippel as opposed to the Commission. WTB Ex. 44, Pp. 4-5. When Sobel was twice asked the question whether he understood the purpose of the affidavit was to attempt and have his licenses removed from the Kay hearing, his answers indicate that he did understand that to be the purpose. Tr. 142-143, see also Tr. 164.

b. Failure to Disclose Relationship

60. Nothing in the affidavits or the pleadings, WTB Exs. 41-44, provides any description of the actual relationship between Sobel and Kay with respect to the Management Agreement stations. The affidavits and the pleadings fail to disclose the following acts to the Commission and the Presiding Judge: (1) Kay manages Sobel's 800 MHz stations pursuant to a Management Agreement (Tr. 103-104, 108-109); (2) Kay was responsible for finding the frequencies and preparing the applications for the Management Agreement stations (Tr. 73-75); (3) Kay provided all the money and the equipment needed to build the Management

Agreement stations (Tr. 144); (4) when Sobel worked on the stations, he did so as a contractor selected and paid by Kay (Tr. 106-108); (5) Kay made the arrangements to acquire and dispose of these licenses (Tr. 101, 126-128, 366); (6) Kay's employees were involved in virtually every aspect of the stations' daily operations (Tr. 339-347); (7) Kay paid all the expenses of the Management Agreement stations, including Sobel's legal fees (Tr. 109, 131); (8) the revenues from the Management Agreement stations were deposited in Kay's bank account, and Sobel has not received any of the operating revenues of the stations (Tr. 144, 348); (9) Kay may purchase the Management Agreement stations at any time for \$500 each (Tr. 125); and (10) Kay had agreed to purchase the stations upon Sobel's death (WTB Ex. 47, Tr. 137-138).

61. Sobel believed that the reason the Commission was delaying the processing of his applications and finder's preference requests was because of the relationship he had with Kay. WTB Ex. 46. He believed the Commission was "confused" about the relationship. Tr. 258. Sobel understood that the Commission would want to know about the actual relationship between himself and Kay. Tr. 143, 151, 156. Notwithstanding those facts, Sobel claims that he did not think the Presiding Judge would have wanted to know the actual relationship between himself and Kay because it "wasn't necessary" or it wasn't "the forum to do it." Tr. 143, 156. Sobel described the purpose of the affidavit "was to establish to the Bureau that I am not an a/k/a of Mr. Kay. I am a real living person and they screwed up." Tr. 143. Sobel allegedly interpreted the designation order in the Kay case as questioning whether he was a real person. Tr. 142, 154, 155, 167. While the first sentence of the statement of the affidavit

discusses Sobel's status as a separate person, the rest of the affidavit makes statements which go far beyond the question of whether Sobel is a real person. WTB Ex. 41.

62. Sobel claims that he had an expectation that when he signed the affidavit, the Bureau would obtain or become aware of the management agreement. Tr. 302. He and Kay discussed the possibility that their relationship would be explored in discovery in the Kay proceeding. Tr. 300. Sobel claims he had no expectation that by signing the affidavit, he was going to prevent the Bureau from becoming aware of the agreement. Tr. 302.

c. "Mr. Kay has no interest in any radio station or license of which I am the licensee."

63. Kay found the frequencies for Sobel to apply for, and he prepared most, if not all, of the applications. Tr. 143-144, WTB Ex. 1. Kay provided the equipment and the money needed to build the stations. Tr. 107-108, 144. Kay's personnel performed services with respect to the stations. Tr. 144. The work Sobel performs on the stations is as a contractor for Kay. Id. Kay sells service on the stations. Id. He pays all the expenses relating to the stations. Id. The operating revenue from the stations goes to Kay. Id. Kay can buy these stations at any time for \$500 each. Tr. 145. Kay is obligated to buy the stations if Sobel dies. Id., WTB Ex. 47.

64. Sobel testified that what he meant by the statement "Mr. Kay has no interest in any radio station or license of which I am the licensee" was that "the station license was issued to myself. It wasn't issued to him." Tr. 146. He said, "The context in which I said

the word interest was an ownership interest in the license, not necessarily in ownership of the equipment or whether he would or would not make any money from the station." Id. (emphasis added). When counsel for the Bureau pointed out that Sobel stated in the affidavit that Kay had no interest in any of Sobel's stations as well as Sobel's licenses, the following exchange ensued:

Q. As a matter of fact, you said here that Mr. Kay did not have any type of interest whatsoever in your stations or licenses. Correct?

A. No, again, the word interest is related to the ownership of the license.

Q. As a matter of fact here, you said he has no interest in any radio station or license. Correct?

A. I believe when we in the business talk about the radio station license, it is the license. It is the piece of paper issued by the FCC which gives you the authority to operate. In fact, I have control over the equipment. So if you want to get off on that tangent, he leased me the equipment per the Management Agreement.

Q. In fact, he owned the equipment. Correct?

A. But he rented it to me. I pay him for it, so he didn't have an interest in it. The issue here is that the radio station license is mine, not his. He had no part of it. That's what the context of this affidavit was.

Tr. 147-148. The management agreement defines the term "Stations" as meaning the "800 MHz band radio facilities", i.e., the equipment (physical facilities). WTB Ex. 39, P. 1. With respect to Sobel's claim in the affidavit (and on the witness stand) that Kay has no interest in the equipment, Paragraph IV A. of the management agreement provides:

During the term of this agreement all equipment provided by Agent [i.e., Kay] and leased by Licensee [i.e., Sobel] shall remain the sole and exclusive property of **Agent**. Nothing contained herein shall be interpreted to provide to Licensee any title, interest, or control over said equipment, except such use of the equipment as is specifically described herein.

WTB Ex. 39, P. 3 (emphasis added).

65. Sobel admitted that Kay's receipt of monies and revenues from the Management Agreement stations was an interest, "but not in the context which I signed this affidavit." Tr. 148. When asked whether Kay's right to buy the stations for \$500 each was an interest, Sobel responded, "Whatever happens in the future, I don't know." Id. Sobel defines being an owner as being in possession of or having the ability to change or control whatever it is that you own. Id. He admitted that while an owner normally has the right to decide when a business is going to be sold, he does not have that right with respect to the Management Agreement stations. Tr. 148-149.

66. Sobel testified that when he signed the affidavit, he thought about the word "interest" "because it was the only thing in here" that "might have been questionable . . ." Tr. 156. Kay recalls that when he and Sobel met to discuss the affidavit, Sobel asked him about the meaning of the word "interest." Tr. 371. Kay told him that to the best of his knowledge, as it had been explained to him (emphasis added):

It referred to ownership as in a partnership or ownership of stock, **as having a direct financial stake in something.** Being an owner or a stockholder or direct party to something.

Id. Sobel testified that Kay has a direct financial stake in the Management Agreement stations. Tr. 150. He testified that he does not think Kay told him that a direct financial stake is an interest in a business. Id. Kay denied having a financial stake in the licenses, but he admitted that with respect to the stations, he owned the equipment and that he obtains revenues from the stations. Tr. 372.

d. "I am not an employer or employee of Mr. Kay..."

67. Sobel has done extensive work for Kay with respect to both the stations licensed to Kay, as well as the Management Agreement stations. See generally WTB Ex. 25. Sobel is paid an hourly fee by Kay for that work. Tr. 106. Sobel believes that despite the extensive work he has done for Kay, he has never been an employee of Kay. Tr. 246. He doesn't believe Kay has ever made any tax withholdings for Sobel, and he has never received any W-2 forms from Kay. Tr. 247. Sobel believes he complies with the IRS guidelines for being an independent contractor. Tr. 247-248.

68. Although the affidavit makes the claim that Sobel is not an employee of Kay, Sobel claims that it "wasn't appropriate subject material" to mention that he performed various types of work for Kay as a contractor. Tr. 150. He denied it was deceptive to tell the Commission he was not an employee of Kay without stating that he performed work for

Kay as a contractor. Tr. 150-151. He claimed it was not relevant "for the purpose of this affidavit" to mention the work he performed for Kay, and he repeated his claim that the affidavit was designed to tell the Commission he was a "separate person." Tr. 151. He knew the Commission wanted to know what the relationship was between Kay and himself. Id.

e. "Mr. Kay does not do business in my name, and I do not do business in his name."

69. Sobel periodically contacts customers or potential customers on Kay's behalf. Tr. 72, 327-328. Sobel performs this work as part of his contracting business. Tr. 72. The Management Agreement stations, which are licensed to Sobel, are marketed in Kay's name or names under which Kay conducts business. Tr. 152-153. Kay signs all the customer contracts, performs the billing, and receives all the revenues from customers using the Management Agreement stations. Tr. 119-120, 132. When asked why it was not deceptive to omit the fact that Kay was doing business for these stations in Kay's name, Sobel testified it was because Kay's agreement with the customers was a separate agreement from Sobel's agreement with Kay. Tr. 153.

PROPOSED CONCLUSIONS OF LAW

A. Unauthorized Transfer of Control Issue

70. One of the fundamental duties of any Commission licensee is that it maintain ultimate control over its station and its license. That duty is imposed by Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §310(d), which states:

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

The Commission explained the fundamental importance of this requirement in Trustees of the University of Pennsylvania, 69 FCC 2d 1394, 1396 (1978) (footnotes omitted). While the statute was discussed in the context of a broadcast station, Section 310(d) applies to all station licenses, and the discussion is equally applicable here:

From the first days of broadcast regulation, licensee control over the operation and management of their broadcast facilities has been central to the proper functioning of the regulatory scheme mandated by Congress and enforced by the Commission. Without licensee supervision of and control over the operation of their stations, the key element of the present system -- accountability to the public and the Commission -- would be lost.

The Congress demonstrated its special concern that ultimate responsibility for a station's operation rests with the party licensed by this Commission by imposing requirements that licensees notify the Commission when a 'transfer of control' over a station was proposed and by further requiring a Commission finding that such a transfer will be in the public interest, convenience, and necessity before it can be consummated.

71. The HDO in this proceeding summarized the law concerning control of a non-broadcast facility or license:

In determining whether de facto control of a non-broadcast license or facility has been transferred in violation of § 310(d), the Commission and the courts have traditionally relied upon a six-part test announced in Intermountain Microwave, 24 RR 983 (1963). The six indicia of de facto control are:

- (a) Does the licensee has [sic] unfettered use of all facilities and equipment?
- (b) Who controls daily operations?
- (c) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission?
- (d) Who is in charge of employment, supervision, and dismissal of personnel?
- (e) Who is in charge of the payment of financing obligations, including expenses arising out of operating?
- (f) Who receives monies and profits from the operation of the facilities?

See also Telephone and Data Systems, Inc. v. FCC, 19 F.3d 42 (1994), and La Star Cellular Telephone Co., 5 FCC Rcd 3286 (1990). The Commission has held that actual control is the touchstone of the Intermountain test. See, e.g., News International, PLC, 97 FCC 2d 349, 355-56 (1984).

72. When the control of the Management Agreement stations is evaluated under the Intermountain standards, it is clear that ultimate control over the stations lies with Kay. The Management Agreement stations are operated in a manner indistinguishable from Kay's stations. While Sobel has a certain amount of day-to-day involvement in the stations' affairs, that involvement is subject to Kay's ultimate control. Furthermore, Kay has made all of the important policy decisions concerning the stations, and he has assumed all of the financial risk and enjoyed virtually all of the revenues from the stations.

73. The agreement between Kay and Sobel is unusual in that it can be renewed for up to fifty years at Kay's sole option. Sobel does not have any right to terminate this agreement. Given the length of the agreement, the arrangement between Sobel and Kay is, for all intents and purposes, permanent unless Kay decides to abandon the agreement, or unless Kay

purchases the stations (which, based upon the offer to purchase the stations for \$1.5 million, are worth approximately \$100,000 each) for the nominal sum of \$500 each.

74. Kay purchased and owns the equipment used in connection with the Management Agreement stations. Kay has the sole and exclusive right to determine who maintains and repairs that equipment. While Sobel currently performs most of the work involved in maintaining and repairing the equipment, he does so as a contract technician selected and paid by Kay. Under the plain language of the agreement, Kay could at any time select someone else to work on the Management Agreement stations, and Sobel would have no right to contest Kay's decision. If Kay took that action, Sobel could access the facilities, but he would not have any control over the equipment (except for the right to discontinue transmissions not in compliance with the Commission's Rules). Thus, while both Kay and Sobel currently have the use of and access to the station equipment, Kay owns and has ultimate control over Sobel's access to all equipment.

75. Kay also has ultimate control over the day-to-day operations of the Management Agreement stations. He and his employees have the responsibility for obtaining and servicing customers, collecting from the customers, billing the customers, maintaining and keeping the financial records, and any and all other managing and marketing functions. The agreement provides that Kay has the sole and exclusive right to perform these functions. It also provides that Kay has the sole and exclusive right to select the other people who may be involved in those functions. Although Kay and Sobel both testified that they did not read the agreement

as excluding Sobel from working on the stations, the plain language of the agreement gives Kay the right to exclude Sobel from working on the stations. Indeed, Kay's control over these stations is perhaps best shown by the fact that when Sobel performs work on stations licensed in Sobel's own name, he does so merely as a contractor selected and paid by Kay. While Sobel has some involvement in the day-to-day operation of the Management Agreement stations, the agreement gives Kay full control over every aspect of the stations' daily operations.

76. Sobel's involvement in the operation of the Management Agreement stations does not establish that Sobel maintains control over the stations. Indeed, Sobel's involvement in the Management Agreement stations is virtually indistinguishable from his involvement with respect to Kay's owned stations. Sobel cannot determine from the invoices he submitted to Kay when he worked on stations licensed to Kay and when he worked on the Management Agreement stations. While Sobel maintains and repairs the Management Agreement stations, assigns many frequencies, activates and deactivates customers on those stations, monitors the stations and assists in determining where customers are located, he performs the same work for Kay's stations at the same hourly rate. Since Sobel does not claim to control Kay's stations, his performance of the same activities for the Management Agreement stations does not establish that Sobel controls those stations.

77. Kay makes no attempt to distinguish between stations licensed in his name and the Management Agreement stations. Kay's salespeople sell service on both Kay's owned

stations and the Management Agreement stations without even knowing which stations they are selling. Kay's employees service and bill the customers of both sets of stations without even knowing who owns the station in question. The stations charge the same prices. The revenue from both sets of stations are deposited into the same bank account. The daily operations of the Management Agreement stations are indistinguishable from the daily operations of Kay's stations.

78. Kay has from the outset controlled the policy decisions concerning the Management Agreement stations. There are four major policy areas that were explored at hearing: the preparation and filing of applications, the acquisition and disposition of licenses, the setting of rates, and retention of counsel. In each area, Kay has controlled the making of policy.

79. Kay controlled the application process by determining the frequencies and sites that were applied for. While Sobel claims to have prepared some of the applications himself, the record shows that Kay made the policy determinations of what frequencies and sites to apply for. With one exception, Kay made the arrangements with site owners to make sure the Management Agreement stations could operate. Furthermore, to the extent that the applications in the record contain handwriting of a principal, all of the handwriting is Kay's. The applications were prepared using Kay's computer program and other information provided by Kay.

80. Sobel has also allowed Kay to totally control the acquisition and disposition of licenses that are in Sobel's name. Kay negotiates the purchase and sale of licenses, and Sobel does not even know the terms of all of the deals under which licenses were acquired. If a special deal is made with another licensee to obtain cancellation of a license in return for equipment or repeater service, it is Kay or his employees who negotiate the deal and provide the equipment and service. Sobel's explanation that he did not have the time needed to perform the work necessary to clear his channels does not justify his abrogation of responsibility to Kay. Kay made the arrangements to acquire and to dispose of the licenses just as if the licenses were in his own name.

81. Moreover, Kay's exclusive option to purchase the Management Agreement stations at any time for \$500 each is, in this case, compelling evidence of his absolute control over the Management Agreement stations. Sobel does not have the right to sell the stations that are licensed in his name. If Kay decides that the stations should be sold, however, all he has to do is give Sobel the nominal sum of \$500 a station, and acquire the licenses himself (or designate a recipient to receive the licenses). The option price of \$500 a station (or \$7,500 for the fifteen stations) is a token payment for stations for which Kay was offered \$1.5 million. Moreover, when a Management Agreement station was sold for between \$70,000 and \$100,000, Kay received most of the money. Sobel, the nominal owner, had to ask Kay for the \$20,000 he did receive. If Kay had wanted, he had the power to pay Sobel the \$500

option fee and keep the rest of the money himself. Sobel did not even know the price for which another Management Agreement station was sold.

82. With respect to rates, Kay has the exclusive right to negotiate rates with customers. Sobel's sole right under the Management Agreement is to disapprove a rate negotiated by Kay if he can show that such disapproval is in the interests of both Kay and Sobel. A customer who comes into Kay's shop is charged the same rate for service on Kay's licensed 800 MHz stations and the Management Agreement stations. Out of the hundreds of customers on the Management Agreement stations, Sobel can only recall two or three instances where a rate was modified. No instance was cited where Sobel ever rejected a contract negotiated by Kay or proposed a modification of a contract in a way that was contrary to Kay's interests. In the absence of any evidence that Sobel has ever attempted to reject a contract or control the negotiation of rates, Sobel's limited paper ability to reject a contract is not evidence of his control. Salem Broadcasting, Inc., 6 FCC Rcd 4172, 4173 (MMB 1991) (licensee's right to preempt or reject programming is not evidence of control because the right was not exercised once).

83. Finally, with respect to retention of counsel, Sobel has not acted independently of Kay. Kay has paid all of Sobel's legal fees with respect to the Management Agreement stations. Kay directed Sobel to Brown & Schwaninger, the communications firm that represented Kay at the time. Eventually, Sobel asked Kay what other law firm he could use, and Kay directed Sobel to another lawyer that Kay uses. With respect to each of the major